Advisory Action Before the Filing of an Appeal Brief	**Application No.** 10/669,953	**Applicant(s)** TAMAOKI ET AL.	
	Examiner WILLIAM H. BEISNER	**Art Unit** 1797	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 28 January 2008 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☐ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
   a) ☐ The period for reply expires _____months from the mailing date of the final rejection.
   b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

   Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☒ The Notice of Appeal was filed on *28 January 2008*. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
   (a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
   (b) ☐ They raise the issue of new matter (see NOTE below);
   (c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
   (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

   NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).
4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
   The status of the claim(s) is (or will be) as follows:
   Claim(s) allowed: _____.
   Claim(s) objected to: _____.
   Claim(s) rejected: _____.
   Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____
13. ☐ Other: _____.

Attachment:PTO-892

/William H. Beisner/
Primary Examiner
Art Unit: 1797

Continuation of 11. does NOT place the application in condition for allowance because:

Applicant's arguments filed 1/28/2008 have been fully considered but they are not persuasive.

With respect to the rejection of claims 1 and 2 under 35 U.S.C. § 102(b) by the reference to Swan, et al., U.S. 5,090,617, Applicants argue (See pages 2-3 of the response filed 1/28/2008) that the rejection is improper because, as required in the instant claims, "the PID controller is used to control the CO2 concentration and setting the CO2 gas concentration value by CO2 gas concentration setting means to calculate a CO2 gas supply time per unit time to the incubation space and a stop time, and supplying CO2 gas to the incubation space in accordance with the calculated supply time and stop time, the CO2 concentration will not overshoot the set point and be able to be converged rapidly to the set point (CO2 gas concentration set value)". Applicants stress that the reference of Swan et al. merely employs the output of the PID controller to toggle the solenoid on when the PID output is above 0. Applicants further stress that the PID control disclosed by Swan et al. is not capable of providing the control provided by the instant invention as evidenced by Figs. 7B-7D of Swan et al.

Applicants' comments are not found to be persuasive for the following reasons. First, the Examiner maintains that the PID control disclosed by the reference of Swan et al. inherently meets the instant claims because the output of the PID controller is the claimed setting means. The reference of Swan et al. discloses that the output of the PID controller provides a number between 0-100 (See column 14, lines 41-42). Using the output as argued by Applicants, would result in the solenoid being open the same amount of time or providing the same amount of flow regardless of the number of the output generated by the PID controller. In other words, according to Applicants' comments, an output of 5 and an output of 75 would result in the solenoid valve providing the exact same amount of gas to the incubator. The Examiner is of the position, that one of ordinary skill in the art of process control would clearly recognize that the proportion control employed in the reference adjusts or calculates the flow of gas required in response to the PID output. If not, the use of PID control would not improve the operation of the system as shown in Figures 7B-7D when compared to Figure 7A. It is noted that Applicants' comments are silent as to whether or not one of ordinary skill in the art would recognize this inherent feature. Furthermore, it is noted that Applicants' own disclosure does not provide any evidence in terms of data and/or graphs that the response provided by the instant invention is any different than that shown in Figures 7B-7D of the reference of Swan et al. Finally, the references of Wheeler et al. (IEEE) and Phillips et al. are made of record to show the level of skill in the art with respect to PID process control and to establish that the output of a PID controller inherently adjusts or calculates the "gas supply time per unit time".

With respect to the rejection of Claims 1 and 2 under § 102(b) by the reference of Vision Scientific (CO2 Incubator Model VS-9108MS, Applicants argues (See pages 3-4 of the response filed 1/28/2008) that this reference is deficient for the same reasons as set forth above with respect to the rejection including the reference of Swan et al.

In response, the Examiner maintains that the rejection is proper for the same reasons as set forth above with respect to the reference of Swan et al.

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